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 SAN JOSE
 #5 746

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

HRL

CV 11-02729

ALMA CLARISA HERNANDEZ,

No.

Plaintiff,

vs.

CEC ENTERTAINMENT, INC. dba CHUCK
 E. CHEESE'S #3001; KENNETH CUMMINS
 and JOSEPH T. KEENAN, GENERAL
 PARTNERS OF 2445 FONTAINE
 ASSOCIATES, A CALIFORNIA GENERAL
 PARTNERSHIP,

**PLAINTIFF'S COMPLAINT ASSERTING
 DENIAL OF RIGHT OF ACCESS UNDER
 AMERICANS WITH DISABILITIES ACT
 FOR INJUNCTIVE RELIEF,
 DECLARATORY RELIEF, DAMAGES,
 ATTORNEYS' FEES AND COSTS (ADA)**

Defendants.

I. SUMMARY

1. This is a civil rights action by plaintiff ALMA CLARISA HERNANDEZ ("Hernandez") for discrimination at the building, structure, facility, complex, property, land, development, and/or surrounding business complex known as:

Chuck E. Cheese's #3001
 2445 Fontaine Road
 San Jose, California
 (hereafter "Facility")

2. HERNANDEZ seeks damages, injunctive and declaratory relief, attorney fees and costs, against CEC ENTERTAINMENT, INC. dba CHUCK E. CHEESE'S #3001,

Hernandez v. CEC Entertainment, Inc., et al.
 Complaint

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1 KENNETH CUMMINS and JOSEPH T. KEENAN, GENERAL PARTNERS OF 2445
2 FONTAINE ASSOCIATES, A CALIFORNIA GENERAL PARTNERSHIP (hereinafter
3 referred to collectively as Defendants), owners and operators of Chuck E. Cheese's #3001,
4 pursuant to the Americans with Disabilities Act of 1990, (42 U.S.C. §§ 12101 et seq.)
5 ("ADA") and related California statutes.

6 II. JURISDICTION

7 3. This Court has original jurisdiction under 28 U.S.C. §§ 1331 and 1343 for
8 ADA claims.

9 4. Supplemental jurisdiction for claims brought under parallel California law --
10 arising from the same nucleus of operative facts -- is predicated on 28 U.S.C. § 1367.

11 5. Hernandez's claims are authorized by 28 U.S.C. §§ 2201 and 2202.

12 III. VENUE

13 6. All actions complained of herein take place within the jurisdiction of the
14 United States District Court, Northern District of California, and venue is invoked pursuant
15 to 28 U.S.C. § 1391(b),(c).

16 IV. PARTIES

17 7. Defendants own, operate, and/or lease the Facility, and consist of a person (or
18 persons), firm, and/or corporation.

19 8. Hernandez was diagnosed with severe scoliosis over fifteen (15) years ago
20 and is confined to a wheelchair. Consequently, Hernandez is "physically disabled," as
21 defined by all applicable California and United States laws, and a member of the public
22 whose rights are protected by these laws.

23 V. FACTS

24 9. The Facility is a public accommodation facility serving food and drink, open
25 to the public, which is intended for nonresidential use and whose operation affects
26 commerce.

27 10. Hernandez visited the Facility and personally encountered barriers (both
28 physical and intangible) that interfered with -- if not outright denied -- her ability to use and

1 enjoy the goods, services, privileges, and accommodations offered at the facility. The
2 barriers personally encountered by Hernandez at the Facility include, but are not limited to,
3 the following:

4 a) Hernandez could not safely and effectively transfer to her wheelchair from her
5 vehicle because the parking space in front of the Facility (which appeared to
6 be designated for persons with disabilities) did not contain an adjacent,
7 properly configured access aisle. Hernandez was then forced to locate a large
8 enough parking space in the general parking lot to offload and transfer to her
9 wheelchair, requiring her thereafter to maneuver her wheelchair dangerously
10 through the parking lot to the Facility entrance.

11 b) Hernandez wanted to play arcade games with her friends and went around the
12 ground floor looking for an accessible route to the second floor where the
13 arcade was located. To her extreme disappointment, she found no way to get
14 to the second floor and was utterly embarrassed when her friends offered to
15 carry her – and carried her – upstairs in her wheelchair.

16 11. Hernandez was, and continues to be, deterred from visiting the Facility
17 because she knows that the Facility's goods, services, facilities, privileges, advantages, and
18 accommodations were and are unavailable to her due to her physical disabilities. Hernandez
19 continues to be deterred from visiting the Facility because of the future threats of injury
20 created by the barriers due to her disabilities including, but not limited to:

- 21 a) Missing and/or incorrect warning signage is installed at the parking facilities;
22 b) Accessible parking spaces and access aisles are not properly configured and/or
23 exceed the maximum slope allowed;
24 c) Parking spaces and/or access aisles reserved for persons with disabilities are
25 improperly marked and/or identified ;
26 d) There is no properly configured and/or identified accessible route provided
27 within the boundary of the site;

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- 1 e) The public restroom and/or accessories provided are not properly configured
2 and/or identified;
- 3 f) The fixtures and accessories provided within the restroom are not installed
4 properly and/or are not accessible;
- 5 g) There is no accessible seating provided;
- 6 h) The fixtures and accessories installed within the facility are not accessible.

7 12. Hernandez also encountered barriers at the Facility which violate state and
8 federal law, but were unrelated to her disability. Nothing within this complaint, however,
9 should be construed as an allegation that Hernandez is seeking to remove barriers unrelated
10 to her disability.

11 13. Defendants knew that these elements and areas of the Facility were
12 inaccessible, violate state and federal law, and interfere with (or deny) access to the
13 physically disabled. Moreover, Defendants have the financial resources to remove these
14 barriers from the Facility (without much difficulty or expense), and make the Facility
15 accessible to the physically disabled. To date, however, Defendants refuse to either remove
16 those barriers or seek an unreasonable hardship exemption to excuse non-compliance.

17 14. At all relevant times, Defendants have possessed and enjoyed sufficient
18 control and authority to modify the Facility, to remove impediments to wheelchair access and
19 to comply with the Americans with Disabilities Act Accessibility Guidelines and Title 24
20 regulations. Defendants have not removed such impediments and have not modified the
21 Facility to conform to accessibility standards. Defendants have intentionally maintained the
22 Facility in its current condition and have intentionally refrained from altering the Facility so
23 that it complies with the accessibility standards.

24 VI. FIRST CLAIM

25 Americans with Disabilities Act of 1990

26 Denial of "Full and Equal" Enjoyment and Use

27 15. Hernandez incorporates the allegations contained in paragraphs 1 through 14
28 for this claim.

Hernandez v. CEC Entertainment, Inc., et al.
Complaint

1 16. Title III of the ADA holds as a “general rule” that no individual shall be
2 discriminated against on the basis of disability in the full and equal enjoyment (or use) of
3 goods, services, facilities, privileges, and accommodations offered by any person who owns,
4 operates, or leases a place of public accommodation. 42 U.S.C. § 12182(a).

5 17. Defendants discriminated against Hernandez by denying her “full and equal
6 enjoyment” and use of the goods, services, facilities, privileges and accommodations of the
7 Facility during each visit and each incident of deterrence.

8 Failure to Remove Architectural Barriers in an Existing Facility

9 18. The ADA specifically prohibits failing to remove architectural barriers, which
10 are structural in nature, in existing facilities where such removal is readily achievable. 42
11 U.S.C. § 12182(b)(2)(A)(iv). The term “readily achievable” is defined as “easily
12 accomplishable and able to be carried out without much difficulty or expense.” *Id.* §
13 12181(9).

14 19. When an entity can demonstrate that removal of a barrier is not readily
15 achievable, a failure to make goods, services, facilities, or accommodations available through
16 alternative methods is also specifically prohibited if these methods are readily achievable.
17 *Id.* § 12182(b)(2)(A)(v).

18 20. Here, Hernandez alleges that Defendants can easily remove the architectural
19 barriers at Facility without much difficulty or expense, and that Defendants violated the
20 ADA by failing to remove those barriers, when it was readily achievable to do so.

21 21. In the alternative, if it was not “readily achievable” for Defendants to remove
22 the Facility’s barriers, then Defendants violated the ADA by failing to make the required
23 services available through alternative methods, which are readily achievable.

24 Failure to Design and Construct and Accessible Facility

25 22. Plaintiff alleges on information and belief that the Facility was designed and
26 constructed (or both) after January 26, 1992 – independently triggering access requirements
27 under Title III of the ADA.

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23. The ADA also prohibits designing and constructing facilities for first occupancy after January 16, 1993, that aren't readily accessible to, and usable by, individuals with disabilities when it was structurally practicable to do so. 42 U.S.C. § 12183(a)(1).

24. Here, Defendants violated the ADA by designing and constructing (or both) the Facility in a manner that was not readily accessible to the physically disabled public – including Hernandez – when it was structurally practical to do so.¹

Failure to Make an Altered Facility Accessible

25. Plaintiff alleges on information and belief that the Facility was modified after January 26, 1992, independently triggering access requirements under the ADA.

26. The ADA also requires that facilities altered in a manner that affects (or could affect) their usability must be made readily accessible to individuals with disabilities to the maximum extent feasible. 42 U.S.C. § 12183(a)(2). Altering an area that contains a facility's primary function also requires making the paths of travel, bathrooms, telephones, and drinking fountains serving that area accessible to the maximum extent feasible. *Id.*

27. Here, Defendants altered the Facility in a manner that violated the ADA and was not readily accessible to the physically disabled public – including Hernandez – to the maximum extent feasible.

Failure to Modify Existing Policies and Procedures

28. The ADA also requires reasonable modifications in policies, practices, or procedures, when necessary to afford such goods, services, facilities, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter their nature. 42 U.S.C. § 12182(b)(2)(A)(ii).

29. Here, Defendants violated the ADA by failing to make reasonable modifications in policies, practices, or procedures at the Facility, when these modifications were necessary to afford (and would not fundamentally alter the nature of) these goods, services, facilities, or accommodations.

¹ Nothing within this Complaint should be construed as an allegation that plaintiff is bringing this action as a private attorney general under either state or federal statutes.

Hernandez v. CEC Entertainment, Inc., et al.
Complaint

1 30. Hernandez seeks all relief available under the ADA (i.e., injunctive relief,
2 attorney fees, costs, legal expense) for these aforementioned violations. 42 U.S.C. § 12205.

3 31. Hernandez also seeks a finding from this Court (i.e., declaratory relief) that
4 Defendants violated the ADA in order to pursue damages under California's Unruh Civil
5 Rights Act or Disabled Persons Act.

6 **VII. SECOND CLAIM**

7 **Disabled Persons Act**

8 32. Hernandez incorporates the allegations contained in paragraphs 1 through 31
9 for this claim.

10 33. California Civil Code § 54 states, in part, that: Individuals with disabilities
11 have the same right as the general public to the full and free use of the streets, sidewalks,
12 walkways, public buildings and facilities, and other public places.

13 34. California Civil Code § 54.1 also states, in part, that: Individuals with
14 disabilities shall be entitled to full and equal access to accommodations, facilities, telephone
15 facilities, places of public accommodation, and other places to which the general public is
16 invited.

17 35. Both sections specifically incorporate (by reference) an individual's rights
18 under the ADA. See Civil Code §§ 54(c) and 54.1(d).

19 36. Here, Defendants discriminated against the physically disabled public –
20 including Hernandez – by denying them full and equal access to the Facility. Defendants
21 also violated Hernandez's rights under the ADA, and therefore, infringed upon or violated
22 (or both) Hernandez's rights under the Disabled Persons Act.

23 37. For each offense of the Disabled Persons Act, Hernandez seeks actual
24 damages (both general and special damages), statutory minimum damages of one thousand
25 dollars (\$1,000), declaratory relief, and any other remedy available under California Civil
26 Code § 54.3.

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Hernandez v. CEC Entertainment, Inc., et al.
Complaint

1 38. She also seeks to enjoin Defendants from violating the Disabled Persons Act
2 (and ADA) under California Civil Code § 55, and to recover reasonable attorneys' fees and
3 incurred under California Civil Code §§ 54.3 and 55.

4 **VIII. THIRD CLAIM**

5 **Unruh Civil Rights Act**

6 39. Hernandez incorporates the allegations contained in paragraphs 1 through 38
7 for this claim.

8 40. California Civil Code § 51 states, in part, that: All persons within the
9 jurisdiction of this state are entitled to the full and equal accommodations, advantages,
10 facilities, privileges, or services in all business establishments of every kind whatsoever.

11 41. California Civil Code § 51.5 also states, in part that: No business
12 establishment of any kind whatsoever shall discriminate against any person in this state
13 because of the disability of the person.

14 42. California Civil Code § 51(f) specifically incorporates (by reference) an
15 individual's rights under the ADA into the Unruh Act.

16 43. Defendants' aforementioned acts and omissions denied the physically
17 disabled public – including Hernandez – full and equal accommodations, advantages,
18 facilities, privileges and services in a business establishment (because of their physical
19 disability).

20 44. These acts and omissions (including the ones that violate the ADA) denied,
21 aided or incited a denial, or discriminated against Hernandez by violating the Unruh Act.

22 45. Hernandez was damaged by Defendants' wrongful conduct, and seeks
23 statutory minimum damages of four thousand dollars (\$4,000) for each offense.

24 46. Hernandez also seeks to enjoin Defendants from violating the Unruh Act (and
25 ADA), and recover reasonable attorneys' fees and costs incurred under California Civil Code
26 § 52(a).

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Hernandez v. CEC Entertainment, Inc., et al.
Complaint

IX. FOURTH CLAIM

Denial of Full and Equal Access to Public Facilities

47. Hernandez incorporates the allegations contained in paragraphs 1 through 46 of this claim.

48. Health and Safety Code § 19955(a) states, in part, that: California public accommodations or facilities (built with private funds) shall adhere to the provisions of Government Code §4450.

49. Health and Safety Code § 19959 states, in part, that: Every existing (non-exempt) public accommodation constructed prior to July 1, 1970, which is altered or structurally repaired, is required to comply with this chapter.

50. Hernandez alleges the Facility is a public accommodation constructed, altered, or repaired in a manner that violates Part 5.5 of the Health and Safety Code or Government Code § 4450 (or both), and that the Facility was not exempt under Health and Safety Code § 19956.

51. Defendants' non-compliance with these requirements at the Facility aggrieved (or potentially aggrieved) Hernandez and other persons with physical disabilities. Accordingly, she seeks injunctive relief and attorney fees pursuant to Health and Safety Code § 19953.

X. PRAYER FOR RELIEF

WHEREFORE, Hernandez prays judgment against Defendants, and each of them, for:

1. Injunctive relief, preventive relief, or any other relief the Court deems proper.
2. Declaratory relief that Defendants violated the ADA for the purposes of Unruh Act or Disabled Persons Act damages.
3. Statutory minimum damages under either sections 52(a) or 54.3(a) of the California Civil Code (but not both) according to proof.
4. Attorneys' fees, litigation expense, and costs of suit.²
5. Interest at the legal rate from the date of the filing of this action.

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² This includes attorneys' fees under California Code of Civil Procedure § 1021.5.

6. For such other and further relief as the Court deems just and proper.

Dated: June 3, 2011

MOORE LAW FIRM, P.C.

/s/ Tanya E. Moore

Tanya E. Moore,
Attorneys for Plaintiff,
Alma Clarisa Hernandez